STATE OF OREGON

CASES DECIDED IN THE SUPREME COURT

March 17, 1931

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# ADVANCE SHEETS

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## CASES DECIDED

IN THE

# SUPREME COURT

OF THE

# STATE OF OREGON

## March 17, 1931

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## SUPREME COURT OF OREGON

HENRY J. BEAN . . . . . Chief Justice
GEORGE M. BROWN . . . . . Associate Justice
JOHN L. RAND . . . . . Associate Justice
GEORGE ROSSMAN . . . . . Associate Justice
J. U. CAMPBELL . . . . . Associate Justice
PERCY R. KELLY . . . . . Associate Justice
HARRY H. BELT . . . . . Associate Justice

### Department No. One

JUSTICE JOHN L. RAND
Presiding
JUSTICE PERCY R. KELLY
JUSTICE GEORGE ROSSMAN

### Department No. Two

JUSTICE HARRY H. BELT
Presiding
JUSTICE GEORGE M. BROWN
JUSTICE J. U. CAMPBELL

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## Cases set for hearing in the Supreme Court

**March 24**
Doehler v. Lansden
Cameron v. Edgemont Inv. Co.
Ellman v. Hammond

**March 25**
Kirkley v. Pac. N. W. P. S. Co.
Hopkins v. S. P. & S. Ry.
Swengel v. Brunn

**March 26**
Nichols v. Jackson Co.
Oregon Surety Co. v. U. S. Nat'l. Bank
Medford Nat. Bank v. Blanchard

**March 31**
Pugh v. Shell
Hennig v. Carstens Pkg. Co.
Jacob v. Pac. Export Lbr. Co.

**April 1**
Ail v. Portland
Cooke v. Portland
Levitch v. Lenhart

**April 2**
Am. Trust Co. v. McCallister
Lott v. DeLuxe Cab Co.
In re Vera M. Packer

## MEMORANDA

### Motions, Etc.

Columbia Tent & Awning Co. v. Thiele; petition for rehearing denied.
Brady v. Hodler; petition for rehearing denied.
Taylor v. Taylor; motion of appellant to dismiss appeal allowed.
Frank E. Smith, resident of Ontario, Oregon, admitted to the bar for nine months on certificate from Supreme Court of Idaho.

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# INDEX TO CASES DECIDED

## February 24, 1931

1615. *Stowe v. Ryan*—Proceeding to review certain orders made by the Civil Service Commission of Multnomah county, resulting in the discharge of petitioner, from employment as chief deputy county clerk. Plaintiff appeals. The opinion upholds the constitutionality of the law, and indicates that the discretion vested in the commission will not be interfered with. Affirmed.

1616. *Ziegler v. Alaska Portland Packers*—Action by a seaman to recover damages for personal injuries while employed on a large seagoing vessel. Judgment for $8,750. Defendant appeals. The merchant marine act of 1920 is *held* to confer upon seamen the same rights as are possessed by railroad employes of common carriers engaged in interstate commerce. Assignments of error relative to the court's instructions are overruled. No error is found in the order refusing to discharge the jury, because of evidence adduced that defendant was insured. Judgment affirmed.

1617. *Brumbaugh v. Barber*—Contest of the will of Clara C. De Haas, deceased. Te defendants appeal from a decree holding the will invalid. The opinion holds that Mrs. De Haas did not possess mental capacity to make a valid will, and was unduly influenced by J. S. Barber. Decree affirmed.

1618. *Bakkum v. Holder*—Action for damages for personal injury as the result of being struck by an automobile while crossing a street. Plaintiff appeals from an order allowing a motion for directed verdict. No error is found in the record. Judgment affirmed.

1619. *Brown v. Becker*—Replevin action to recover certain cattle and horses. Defendant appeals from a judgment in favor of plaintiff. The only question presented was whether it was within the discretion of the trial court to allow a reply to be filed. Judgment affirmed.

1620. *Pearson v. O.-W. R. & N. Co.*—On petition for rehearing filed by plaintiff-defendant, upon the ground that the court erred in holding he was not entitled to a jury trial. Based upon the case of Tribou v. Strowbridge, 7 Or. 156, this question is determined adversely to plaintiff's contention. Petition is denied.

1621. *Pape v. Linn County*—Appeal by defendant from a judgment awarding damages of $3,327 to plaintiff for the establishment of a public highway across his premises. The case is reversed because of two erroneous instructions to the jury on the elements of damage to be considered. The opinion concludes that the true measure of damages "is the actual cash market value of the strip taken and the depreciation in market value of that portion of the tract not actually included in the right of way." Reversed and remanded.

1622. *Lewis, Adm'x v. Siegman, Adm'x*—Action to recover for the reasonable value of services rendered between October 27, 1897, and August 3, 1921, at $100 a month amounting to $28,500. Judgment for $8,000 and defendant appeals. *Held* that the complaint fails to allege that plaintiff fulfilled any promise or that she performed the alleged contract. There was no cause of action stated in the complaint. Demurrer should have been sustained. Judgment reversed.

1623. *Portland v. Multnomah County*—Suit to determine whether certain property owned by the city of Portland is subject to taxation. The defendant appeals. *Held* that no valid or enforcible lien is upon the land which passed to the city prior to the levy of the tax. Decree affirmed.

1624. *Duke v. Low, Sheriff*—Suit to enjoin defendant from making a sale upon execution of certain real property belonging to plaintiff. Defendant appeals. *Held* that liens are not dissolved by bankruptcy unless the lienees are insolvent at the time they are perfected and the burden is on the person who claims a lien is void to prove the insolvency of the person against whom it was obtained at the time it was secured. The complaint does not support the decree. Reversed and remanded.

1625. *Katz v. Patterson et al.*—Suit to enjoin the defendants from leasing lands in Clatsop county claimed by plaintiffs as accretions to certain tide lands purchased from the state in 1907. Decree for defendants holding that the land in controversy belongs to the state of Oregon. Affirmed.

1626. *State ex rel. v. Ekwall, Circuit Judge*—Original mandamus proceeding to require the circuit judge to hold invalid an order amending the bill of exceptions in *West v. United Rys. Co.* *Held* that this proceeding cannot be maintained to accomplish the result which the relators now seek. Section 2-702, Oregon Code 1930, makes provision for correcting a bill of exceptions until it conforms to the truth. Writ dismissed.

1627. *West v. United Rys. Co.*—Personal injury action. Judgment for plaintiff. Defendant appeals. The opinion concludes that since the defendants failed to save an exception to the denial of their motion for a directed verdict the record presents nothing for our review. Affirmed.

1628. *Nalley v. First Nat. Bank*—On petition for rehearing. The former opinion holding in favor of plaintiff is sustained. Petition is denied.

1629. *Wychgel v. States Steamship Co.*—Action for damages for personal injuries brought under Merchant Marine Act of 1920. Defendant appeals from a judgment of $30,000. The court finds there is no evidence to support the amount of the verdict, and that the facts and circumstances do not warrant an allowance of more than $15,000. The judgment is so modified. Justice Rand dissenting.

1630. *Jurgens v. Sheridan et al.*—Suit to quiet title to lot 10, block 12, Driverton addition to Eugene, Oregon. Defendants set up mechanics' liens for labor and material furnished on building on premises. Decree for plaintiff. The decision holds that plaintiff has not sustained the burden of proof which he has alleged in his replies. The case is reversed and dismissed.

1631. *Copeland Yards v. Sheridan et al.*—Suit to foreclose a mechanic's lien for materials furnished in the construction of buildings. Companion case to No. 1630, decided today. The decree of the circuit court dismissing the complaint and cross complaint and counterclaims is reversed and a decree is directed in favor of plaintiff and the defendant lien claimants foreclosing their liens.

1632. *Holt v. Guaranty & Loan Co.*—Suit to foreclose a lien on personal property pledged to secure payment of a loan of $5,000, with interest at 8 per cent. Decree for plaintiff. Defendant appeals. The opinion finds no reason for reversal. Decree affirmed.

1633. *Teel v. Steinbach Estate*—Action for damages for personal injuries. Defendants appeal from an adverse judgment. The opinion holds that plaintiff was in possession and control of the premises where she was injured, using the stairway almost daily, and knew its condition better than defendants. The lessor owed no duty to repair unless notified. Judgment reversed.

1634. *State v. Walker*—Defendant was tried and convicted of unlawful possession of intoxicating liquor. Defendant filed motion to suppress certain evidence, accompanied by an affidavit. The motion was denied. It is claimed that the evidence was obtained unlawfully, in violation of Sec. 9, Art. I, Oregon Constitution. *Held* that no constitutional rights were invaded. Judgment affirmed.

1635. *La Grande Nat'l Bk. v. Friswold*—Appeal by defendant from a decree in favor of plaintiff foreclosing a mortgage upon certain lands. The decree holds that the mortgage is invalid so far as it affects the interest of minors, and applies only against the one-fourth interest owned by plaintiff. The decision on appeal affirms the circuit court.

## March 17, 1931

1636. *Re Estate Marie Banfield*—Petitioner Charles C. Banfield bases his right to have property set off as a homestead upon chap. 345, Laws 1927. The opinion holds that the lower court erred in requiring petitioner to pay to the estate $2,000 in order to secure his exemption privilege. The homestead property was worth about $3,000. Decree is modified granting the petition for the homestead subject to expenses of last sickness and funeral of decedent, and costs of probate. Neither party to recover costs in this court.

1637. *Union Sav. & Loan An. v. Getty*—Suit for the strict foreclosure of a contract for sale of a residence property in Eugene, Ore. Defendant appeals from a decree of foreclosure. *Held,* that delay of defendants in making their claim for recission and their action treating the contract as in force precludes them from rescinding the contract. Decree affirmed.

1638. *Friberg v. Elrod*—Suit to foreclose a mechanic's lien for labor performed under a written contract. Plaintiff appeals from a decree awarding him $5,717.17 and $500 attorney's fees. *Held,* that plaintiff is entitled to an additional sum of $1,292.02. Decree is modified.

1639. *Lane v. Beveridge*—Action against the county clerk and his surety for alleged negligence in failing to docket a decree of foreclosure and a deficiency judgment in a suit entitled Lane v. Shears. A demurrer to the complaint was sustained. Plaintiff declined to plead further and the action for $1,250 damages was dismissed. The opinion holds that the negligence if any was chargeable to plaintiffs. The demurrer was properly sustained. Affirmed.

1640. *Amend v. Amend*—Divorce suit brought by the wife on the ground of cruel and inhuman treatment. Cross-complaint alleges adultery. Defendant was granted a decree. Plaintiff appeals. *Held,* that neither party is entitled to a decree of divorce. Plaintiff is allowed judgment for costs and attorney fees.

1641. *Goldfoot v. Lofgren*—Defendant appeals from a judgment in favor of plaintiff for $2,500 damages, resulting from negligent treatment in a private hospital. Eight assignments of error are presented, but the decision holds that there was no reversible error. Affirmed.

1642. *Weinstein v. Wheeler*—On petition for rehearing filed by defendant. Action for damages for personal injuries. The previous decision granted a new trial. The petition, argues that error was committed in passing upon certain requested instructions. The petition for rehearing is denied.

# CUMULATIVE INDEX

Opinions of the Supreme Court, published in Advance Sheets, since January 1, 1930:


| | Vol. | Page |
|---|---|---|
| Adskim v. O.-W. R. & N. Co. | 12 | 11 |
| Algoma Lbr. Co. v. Herlihy | 10 | 1061 |
| Baker v. Jensen | 12 | 279 |
| Bakkum v. Holder | 12 | 467 |
| Barker v. Sonner | 12 | 97 |
| Beach v. Brightwood | 10 | 541 |
| Bend v. Title & Trust Co. | 10 | 1363 |
| Bennett v. First M. E. Church | 10 | 1215 |
| Big Butte Horse & Cattle Assn. v. Anderson | 10 | 1375 |
| Blair v. State Ind. Acc. Com. | 10 | 1055 |
| Blair v. McCool | 12 | 311 |
| Blanchard v. Makinster | 11 | 181 |
| Brady v. Hodler | 12 | 331 |
| Brady v. Schnitzer | 12 | 325 |
| Brown v. Brown | 12 | 421 |
| Brumbaugh v. Barber | 12 | 459 |
| Boyer v Edgmont Ins. Co. | 12 | 245 |
| Boyd v. Coleman | 12 | 91 |
| Brown v. Becker | 12 | 471 |
| Brown v. Briggs | 11 | 519 |
| Brown v. Hilleary | 10 | 927 |
| Brown v. Laird | 11 | 57 |
| Brown v. Laird | 11 | 439 |
| Burns v. Coast Auto Lines | 11 | 509 |
| Carstens Pkg. Co. v. S. P. Co. | 11 | 353 |
| Chilson v. Lane Co. Bank | 10 | 1499 |
| City of Eugene v. Keeney | 11 | 735 |
| Clanton v. Kelp Ore Co. | 12 | 377 |
| Clark v. Adney | 11 | 527 |
| Closset v. Portland Amus. Co. | 10 | 1413 |
| Closset v. Portland Amus. Co. | 11 | 783 |
| Cobbs-Mitchell Co. v. McMahan | 10 | 1395 |
| Cockerham v. First Nat. Bank | 10 | 1045 |
| Col. Tent & A. Co. v. Thiele | 12 | 321 |
| Cole v. Reeves | 12 | 155 |
| Cont. Guaranty Corp. v. Chrisman | 11 | 873 |
| Copeland Yards v. Sheridan | 12 | 593 |
| Cove Lodge No. 52 v. Harris | 12 | 37 |
| Crocker v. Russell | 10 | 1017 |
| Crouch v. Central Labor Council | 11 | 635 |
| Dallas v. Gates | 10 | 1353 |
| Daniels v. Riverside Dairy | 10 | 919 |
| Demars v. Heathman | 10 | 811 |
| DeYoung v. Robertson | 10 | 1521 |
| Deschutes River Adjudication | 10 | 699 |
| Dibble v. David Hodls Co. | 10 | 845 |
| Diller v. Riverview Dairy | 10 | 1185 |
| Dodds, Admr., v. Mayer | 12 | 107 |
| Doehler v. Lansdon | 11 | 243 |
| Dolan v. Cont. Cas. Co. | 10 | 1501 |
| Donaghy v. O.-W. R. & N. | 10 | 1223 |
| Donaghy v. O.-W. R. & N. Co. | 11 | 363 |
| Dorfman v. P. E. P. Co. | 10 | 969 |
| Dose v. Lilly Co. | 10 | 837 |
| Downing v. Lane Co. Bank | 10 | 1493, 1497 |
| Driscoll v. Berg | 11 | 701 |
| Duke v. Law | 12 | 513 |
| Egli v. Hutton | 11 | 885 |
| Elliott v. City of Eugene | 11 | 863 |
| Fahnrich Groc. Co. v. Paulsen | 11 | 585 |
| Fawkes v. Curtis | 10 | 941 |
| Fletcher v. So. Ore. Truck Co. | 10 | 535 |
| First Nat'l Bank v. Morgan | 10 | 831 |
| Fisher v. Fisher & Allen | 10 | 1517 |
| Gabrielson, Admx., v. Dixon | 11 | 239 |
| Gatt v. Hurlburt | 10 | 671 |
| Gearhart v. Gearhart Park Co. | 10 | 821 |
| Gile v. Hoy | 10 | 1527 |
| Godlove v. Russell | 11 | 825 |
| Goff v. Elde | 10 | 1093 |
| Haberlach v. Tillamook County Bank | 11 | 625 |
| Haberly v. F. M. F. R. A. | 10 | 1045 |
| Haberly v. Farmers Mut. Fire Relief Assn. | 11 | 683 |
| Haberly v. Farmers M. F. R. A. | 12 | 49 |
| Hague v. Hague | 11 | 387 |
| Hansen v. Bedell Co. | 10 | 529 |
| Haynes v. Sprague | 12 | 413 |
| Heacock v. Weatherford | 11 | 845 |
| Hecker v. Union Cab Co. | 11 | 743 |
| Held v. P. S. A. P. Co. | 12 | 405 |
| Hendricks v. P. E. P. Co. | 10 | 1325 |
| Hendricks v. P. E. P. Co. | 11 | 577 |
| Henrici v. Paulsen | 11 | 595 |
| Herman v. East Side Log. Co. | 12 | 417 |
| Hicks v. Hill Aeronautical School | 10 | 947 |
| Hilgedorf v. Bertschinger | 10 | 575 |
| Hogan v. Mason Motor Co. | 10 | 1209 |
| Hollopeter v. Palm | 11 | 133 |
| Hollopeter v. Palm | 11 | 905 |
| Holmes v. Goble | 10 | 571 |
| Holt v. Guaranty & Loan Co. | 12 | 599 |
| Hooper v. Carlson | 11 | 589 |
| Hooton v. Jarman Chev. Co. | 11 | 709 |
| Hooton v. Jarman Chevrolet Co. | 12 | 399 |
| Hopka v. Forbes | 11 | 767 |
| Houck v. Houck et al. | 10 | 1205 |
| Hynd Bros. v. Perry | 11 | 425 |
| Hynd Bros. v. Perry | 11 | 671 |
| In re De Lin Estate | 12 | 25 |
| In re Deschutes River Adj. | 10 | 699 |
| | 12 | 53 |
| In re Fehlmann Estate | 11 | 335–347 |
| In re Guardianship of Viola Wells | 10 | 1409 |
| In Re Pine Creek Adjudication | 10 | 1265 |
| Jerman v. Nelson | 11 | 691 |
| Johnson v. McDonald | 10 | 1007 |
| Josephson v. Josephson | 10 | 981 |
| Judson v. Bee Hive Auto Co. | 11 | 809 |
| Jurgens v. Sheridan | 12 | 585 |
| Kamm v. Portland | 10 | 509 |
| Kane v. Kane | 11 | 191 |
| Katz v. Patterson | 12 | 521 |
| Kiernan v. Norblad | 11 | 475 |
| Kilgore v. Koen | 10 | 1193 |
| Knox v. Abrams | 10 | 795 |
| Korber v. Portland | 12 | 145 |
| Krause v. S. P. Co. | 12 | 391 |
| Krebs v. Perry | 11 | 425 |
| Krebs v. Perry | 11 | 671 |
| Kuniholm v. P. E. P. Co. | 10 | 1529 |
| La Follett v. La Follett | 10 | 1271 |
| La Grande Nat. Bank v. Friswald | 12 | 633 |
| Lamm v. Silver Falls Timber Co. | 10 | 591 |
| Lamm v. Silver Falls Timber Co. | 11 | 163 |
| Larsen v. St. Ind. Acc. Comm. | 12 | 185 |
| Latture Equip. Co. v. Gruendler | 10 | 1457 |
| Lawrence v. Troy | 10 | 1401 |
| Leavitt v. Stamp | 11 | 501 |
| Lewis v. Cont. Cas. Co. | 12 | 225 |
| Lewis v. Siegman | 12 | 499 |
| Lipman Oil Co. v. Schwind | 10 | 645 |
| Liquidators v. Clifton | 10 | 765 |

| | Vol. | Page |
|---|---|---|
| Little Applegate v. Munsell | 11 | 79 |
| Loe v. Britting | 10 | 959 |
| Loveland v. Plant | 10 | 1003 |
| McCargar & McKay v. Fed. Sec. Co. | 11 | 715 |
| McCartney v. Westbrook | 10 | 803 |
| McCredie v. McCredie | 11 | 891 |
| McDonaugh v. Natl. Hosp. Ass'n | 11 | 813 |
| McKinney v. Nayberger | 12 | 295 |
| Manning v. Helbock | 12 | 189 |
| Marquardt v. Fisher | 12 | 341 |
| Martin v. Cambas | 11 | 663 |
| May v. Roberts | 10 | 861 |
| Merritt v. Merritt | 10 | 1339 |
| Michelin Tire Co. v. Williams | 11 | 773 |
| Miller v. Norblad | 11 | 477 |
| Miller v. City of Woodburn | 11 | 899 |
| Moss v. Peoples Cal. Hydro-El. Co. | 11 | 563 |
| Nalley v. First Nat'l Bank | 11 | 751 |
| Nalley v. First Nat'l. Bank | 12 | 543 |
| Neppach v. Mitchell | 10 | 659 |
| No. Life Ins. Co. v. Burkholder | 11 | 777 |
| Olsen v. Crow | 10 | 1449 |
| Pac. Fin. Corp. v. Ellithorpe | 10 | 1505 |
| Pac. Spruce Corp. v. Ore. Portland Cement Co. | 10 | 783 |
| Pac. Spruce Corp. v. Woodcock | 10 | 1479 |
| Paget v. Peters | 10 | 885 |
| Paget v. Peters | 10 | 1477 |
| Pape v. Linn County | 12 | 489 |
| Pearson v. O.-W. R. & N. Co. | 12 | 179 |
| Pearson v. O.-W. R. & N. | 12 | 477 |
| Peluck v. Pac. Mch. & Bl. Co. | 11 | 543 |
| Pfaffinger v. Seely | 11 | 331 |
| Phegley & Cavender v. Swender Blue Print Co. | 10 | 1441 |
| Phillips v. Steen | 11 | 491 |
| Portland Iron Wks. v. Siemens | 12 | 271 |
| Portland v. Kamm | 10 | 515 |
| Portland v. Mima Corp. | 10 | 565 |
| Portland v. Mult. County | 12 | 507 |
| Portland Term. Inv. Co. v. Porter Ind. Co. | 10 | 1433 |
| Putnam v. Norblad | 11 | 797 |
| Quillen v. Schimpf | 11 | 293 |
| Ragan v. MacGill | 11 | 495 |
| Reckard v. Ryan | 10 | 1335 |
| Redfield v. Fisher | 11 | 451 |
| Redfield v. Norblad | 12 | 257 |
| Rekdahl v. Cheney | 11 | 579 |
| Rhodes v. Libby, McNeill & Libby | 10 | 1067 |
| Richanbach v. Ruby | 11 | 687 |
| Richanbach v. Ruby | 12 | 165 |
| Richter v. Derby, Admr. | 12 | 229 |
| Root v. Arnold | 11 | 159 |
| Rossier v. Union Auto Ins. | 11 | 311 |
| Rowley v. Medford | 10 | 681 |
| Ruth v. Cox | 11 | 149 |
| Salway v. Mult. Lbr. & Box Co. | 11 | 513 |
| Sander v. Cal.-Ore. Power Co. | 11 | 229 |
| School Dist. No. 106 v. New Amst. Cas. Co. | 10 | 1081 |
| Schramm v. Done | 11 | 611 |
| Schrunk v. Hawkins & Roberts | 10 | 1423 |
| Senner v. Danewolf | 11 | 703 |
| Shepherd v. Allingham | 10 | 1075 |
| Simmons v. Wash. F. N. Ins. Co. | 12 | 347 |
| Sinclair v. Burke | 10 | 1011 |
| State v. Anderson | 11 | 43 |
| State v. Broom | 10 | 581 |
| State v. Burckhard | 12 | 75 |
| State ex rel. v. Bailey | 10 | 547 |
| State ex rel. Carson v. Hoss | 10 | 1255 |
| State v. Delaplain | 10 | 1027 |
| State v. Duffy | 12 | 359 |
| State ex rel. v. Ekwall | 12 | 538 |
| State ex rel. v. Fendall | 12 | 195, 203 |
| State v. Fisher | 10 | 1097 |
| State ex rel. v. Fisk | 10 | 557 |
| State v. Frohnhofer | 11 | 761 |
| State v. Gold | 11 | 37 |
| State v. Imlah et al. | 12 | 81 |
| State v. Kincaid | 10 | 769 |
| State v. Kincaid | 10 | 1267 |
| State v. Knight | 10 | 1513 |
| State v LaFollett | 11 | 375 |
| State ex rel. v. Hoss | 11 | 401 |
| State ex rel. v. LaFollett | 10 | 907 |
| State ex rel. v. LaFollett | 11 | 245 |
| State v. La Jesse | 10 | 677 |
| State ex rel. v. Mack | 11 | 379 |
| State ex rel. v. Mannix | 10 | 1137 |
| State ex rel. v. Mannix | 11 | 95 |
| State ex rel. v. Mart | 12 | 253 |
| State ex rel. v. McClain | 10 | 911 |
| State v. Miller | 10 | 1535 |
| State ex rel. v. Montag Co. | 10 | 987 |
| State v. Murphy | 11 | 39 |
| State v. Walker | 12 | 625 |
| Statts v. Wagner | 12 | 335 |
| Stone v. Oliver | 12 | 45 |
| Stowe v. Ryan | 12 | 431 |
| Sutherland v. Wickey | 10 | 1281 |
| Sweek v. Bennett | 11 | 69 |
| Tallman v. Havill | 11 | 85 |
| Teel v. Steinbach Est. | 12 | 615 |
| Title & Trust Co. v. Sec. Bldg. | | |
| Tooley v. S. P. & S. Ry. Co. | 10 | 525 |
| Tusi v. Jacobsen | 11 | 531 |
| Tusi v. Jacobson | 11 | 851 |
| Union Cent. Life Ins. v. Parks | 11 | 419 |
| United Cont. Co. v. Duby | 11 | 255 |
| Vancouver Nat'l Bk. v. McCredie | 12 | 289 |
| Varrelman v. Flora Log Co. | 10 | 629 |
| Varrelman v. Flora Log Co. | 11 | 179 |
| Veatch v. City of Cottage Grove | 10 | 1349 |
| Walker v. Sutherland | 10 | 1313 |
| Wall v. Hornig | 10 | 691 |
| Wayne v. Huber | 11 | 9 |
| Wayne v. Huber | 11 | 831 |
| Weatherly v. Hochfeld | 10 | 853 |
| Webb v. Woodcock | 11 | 111 |
| Weddle v. Parrish | 12 | 237 |
| Weinstein v. Wheeler | 12 | 133 |
| Weir v. Mariott | 11 | 659 |
| Weir v. Marriott | 12 | 299 |
| Wemett v. Mount | 11 | 407 |
| Wemme v. Hurlburt | 10 | 1317 |
| Wemme v. Noyes | 12 | 31 |
| Wemme v. Noyes | 12 | 207 |
| Weniger v. Ripley | 11 | 645 |
| West v. United Rys. Co. | 12 | 541 |
| Whetstone v. Rogue River Vy. Canal Co. | 10 | 1091 |
| White v. Strowbridge | 11 | 327 |
| Wickwire v. Hanson | 10 | 1259 |
| Wilson v. Portland | 10 | 665 |
| Wychgel v. StatesSteamship Co. | 12 | 561 |
| Ziegler v. Alaska-Portland Packers | 12 | 447 |
| Zimmerman v. Union Auto Ins. | 11 | 285 |
| Zurich Ins. Co. v. Carlton & C. Ry. Co. | 11 | 47 |

No. 1636—March 17, 1931

# IN THE SUPREME COURT OF THE STATE OF OREGON

IN THE MATTER OF THE ESTATE OF MARIE BANFIELD, DECEASED.

Appeal from Circuit Court, Multnomah County.

GEORGE TAZWELL, Judge.

Argued and submitted October 24, 1930.

Department 2.

*Albert L. Gordon* for Charles C. Banfield, petitioner-appellant.

*A. C. Shaw* for Henry J. Schulderman and Marie Schulderman, contestants and cross-appellants.

*Julius Silvestone* on brief, *amicus curiae.*

BROWN, J.

MODIFIED.

Charles C. Banfield filed a petition in the Probate Department of the Circuit Court for Multnomah county, Oregon, praying that lot 9, block 5, in Howe's addition to Portland, with the dwelling house thereon and its appurtenances, be set apart as his homestead.

The allegations of the petition are substantially as follows:

On March 26, 1913, the petitioner was intermarried with Marie Banfield, who died on February 2, 1928, an inhabitant of Multnomah county, and possessed of personal and real property, including the property above described, which, at the time of her decease and for ten years prior thereto, was occupied by petitioner and herself as their place of abode and was their homestead. In addition to her widower, the petitioner

herein, she left surviving her as heirs and devisees a brother, a sister, two nieces, a nephew and a cousin, all residing in Portland. She left a will, wherein the petitioner was appointed executor of her estate, and, by an order entered on February 24, 1928, letters testamentary were issued to him. On or about March 28, 1928, an inventory of her property was made and filed, showing the appraised value of the estate to be the sum of $37,881.34, and the indebtedness $1,000. The petitioner alleged that no portion of the homestead property was necessary for the expense of the last sickness or funeral of the deceased, or of the costs and charges of the probate proceedings, and that no homestead had been established or claimed prior or subsequent to the death of decedent, save and except by petitioner.

In answer to the application for homestead, Henry J. Schulderman and Marie Schulderman, brother and niece of decedent, alleged that they were two of the heirs and devisees of the deceased and were seized of an interest in the real property described in the petition, which property was appraised at $5,000; that by the will of deceased a life estate in that property was devised to the petitioner, "and certain interests therein to said Henry J. Schulderman and Marie Schulderman." They denied that that property was, to the extent of $3,000, exempt from seizure and sale under execution in accordance with the laws of Oregon relating to homestead exemptions, and alleged that the homestead so claimed was subject to and chargeable with the expense of the last sickness and the funeral of the decedent and the costs of administration of her estate, and with the taxes assessed thereon. They further alleged that claims for these costs and expenses had been filed with the executor in the

amount of $1,463.57, but that of this amount $375 were for expenses in a partition suit not properly chargeable to the estate. They alleged that the inventory was insufficient in a number of particulars not pertinent to the merits of this case. They averred that the petitioner was estopped from claiming the property above described as a homestead. They prayed that the petition of petitioner be dismissed and any and all relief denied him, "and/or that if a portion of said lot 9, block 5, Howe's addition, described in said petition, be set apart as the homestead of the petitioner to the extent of $3,000 in value thereof, that said property to said extent be decreed by this court to be subject to and charged with the sum of $1,397.20 for the expenses of the last sickness and/or for the funeral of the said Marie Banfield, and the costs and charges of administration of her said estate, and with any other sum that may be or become due on account of said last sickness, funeral and costs and charges of administration, and with the said sum of $66.37 due for taxes upon said property."

As a result of the hearing, the court ordered that the real property involved herein be set apart to the petitioner as a homestead, "upon the condition that he pay to Charles C. Banfield, executor of the estate * * *, the sum of $2,000 (amount found by the court to be the depreciation in value of the property for the alleged failure of petitioner to keep it in repair), said $2,000 to be administered as the other property of said estate."

From this decree, both the petitioner and the contestants appeal.

BROWN, J. Webster's International Dictionary defines "homestead" as:

"The land and buildings thereon occupied by the owner as a home for himself and his family, if any, and more of less protected by law from the claims of creditors. The right of exemption is purely statutory and does not exist in Great Britain, but is given by statute in nearly all the states of the United States."

The meaning of "owner," as used above, is set out in 3 L. R. A., 794, note, in the following language:

"The owner of a life estate in land, as well as the owner of the fee therein, may be considered as the owner within the meaning of the Homestead Act providing for the exemption from levy (of the land)."

The courts have often declared that homestead laws are enacted as a matter of public policy, in the interest of humanity: 39 C. J., 782. However, homestead statutes are subject to the established rules of construction applicable to all laws. When the import of words, either ordinary or technical, is obvious, plain and easily understood, there is no occasion for construction or interpretation: Waples, Homestead and Exemption, p. 2. That author likewise says, at page 109, that the owner of land for a lifetime occupying the premises lawfully is the lord of the manor while he lives.

Marie Banfield devised to her husband, the petitioner herein, a life estate in her real property. It is settled law in this jurisdiction that the holder of a life estate may have a homestead carved out of it. See *Marvin & Co. v. Plazza,* 129 Or. 128 (276 P. 680). That the petitioner has title sufficient to support a homestead claim is established by the decisions of this court and in many other jurisdictions. See *Marvin & Co. v. Plazza,* supra.

The petitioner bases his right to have the property herein set off as a homestead upon chapter 345, General Laws of Oregon, 1927. This chapter was house bill No. 509, and was introduced by a capable attorney, to amend sections 225 and 226, Oregon Laws, and section 1234, Oregon Laws, as amended by chapter 263, General Laws of Oregon, 1923.

For an interesting and illuminating discussion of the homestead law, we direct attention to *Leet v. Barr,* 104 Or. 32 (202 P. 414, 206 P. 548); *Slattery v. Newell,* 115 Or. 22 (236 P. 268); *Overland v. Jackson,* 128 Or. 455 (275 P. 21); *In re Estate of Brizzolari,* 129 Or. 307 (275 P. 17). See, also, Or. Code 1930, § 3-201, et seq. It is the duty of this court to apply the act in its entirety. Every section, sentence and word has a meaning; and the language of the act appears to be plain.

The Oregon Homestead Act (chapter 345, Gen. L. of Or., 1927) provides that the homestead shall be charged with the expenses of the last sickness and the funeral of the deceased, and the costs and charges of administration. By section 2 thereof, codified as Or. Code 1930, § 3-206, § 226, Or. L., is amended to read:

"Section 226. *Devise of Homesteads.* When any homestead shall have been disposed of by the last will and the testament of the owner thereof, the devisee shall take the same free of all judgments and claims against the testator of his homestead estate, except mortgages lawfully executed thereon and laborers' and mechanics' liens; provided, however, that such exemption shall not extend to any devisee other than a child, grandchild, widow or widower, and father or mother of the testator; provided further, such homestead shall be subject to and charged with the expenses of his last sickness and of his funeral and the costs and charges of probate; and provided further, that nothing herein contained shall be construed

as preventing or limiting the court or judge from setting apart for the widow, widower or minor children of the deceased the homestead as provided in section 1234, Oregon Laws."

By section 3 of the act, § 1234, Or. L., as amended by chapter 163, General Laws of Oregon, 1923, is amended to read:

"Section 1234. Upon the filing of the inventory, the court or judge thereof shall make an order setting apart for the widow, widower or minor children of the deceased, if any, all the property of the estate exempt from execution, according to exemption laws in effect as of date of death of deceased. The property thus set apart is the property of such widow or widower, to be used or expended by him or her in the maintenance of herself and minor children, if any; or if there be no widow or widower, it is the property of the minor child; or if more than one child, then of the minor children in equal shares, to be used or expended in the nurture and education of such child or children by the guardian thereof, as the law directs."

By virtue of the foregoing act, it was the duty of the probate court, upon the filing of the inventory, to make an order setting apart for the widower the property of the estate exempt from execution, according to the exemption laws in effect as of date of death of deceased. However, at the time that the inventory was filed, no homestead had ever been established under the exemption law, and not until many months later did the widower conceive the notion of claiming a homestead in his deceased wife's property. This, however, is not a bar to his now claiming as exempt the property sought as a homestead.

This is not a proceeding to determine title to the house and lot involved herein. It is a proceeding to set off a portion of the decedent's estate as entitled to the privileges designated in the homestead exemp-

tion law. As appears from our statement, the petitioner is the devisee of a life interest in the real property of his deceased wife; and he, as her widower, is the only surviving person designated by the homestead exemption law as entitled to the exemption privilege. The court erred in requiring him to pay to the estate the sum of $2,000 in order to secure his exemption privilege. Claims against him arising out of his alleged negligence in caring for the estate should be determined in the proper forum. Moreover, a careful consideration of the record clearly shows that the value of the homestead property was not in excess of $3,000.

"The homestead right is a fee-simple interest, where an estate in fee supports it; but it is a life interest when supported by a life estate, and there is no inconsistency": Waples, Homestead and Exemption, p. 116.

It is hereby ordered that the petitioner herein shall take as his homestead the property described in his petition, subject to the expenses of the last sickness and the funeral of decedent, and the costs and charges of probate.

Neither party shall recover costs in this court.

Bean, C. J., and Belt and Kelly, JJ., concur.

No. 1637—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

UNION SAVINGS & LOAN ASS'N, A CORP., *Respondent, v.*

F. C. GETTY and MABEL C. GETTY, *Appellants.*

Appeal from Circuit Court, Lane County.

GEO. F. SKIPWORTH, Judge.

Argued and submitted October 17, 1930.

Department 2.

*Harry G. Hoy* (with Lawrence T. Harris and Edward O. Doxey on brief) for appellants.

*J. K. King* (Potter & King on brief) for respondent.

BEAN, C. J.

AFFIRMED.

BEAN, C. J. This is a suit for the strict foreclosure of a contract for the sale of certain residence property in Eugene, Oregon. The contract of sale provides that time is the essence of the contract. It was dated October 26, 1927, and provided for an initial cash payment of $375 and monthly payments of $37.50, beginning November 20, 1927, for a period of eighteen months, and thereafter in the amount of $47.50 each until the amount was fully paid. The purchase price was $6,000. The defendants were permitted by plaintiff to take possession of the premises some time in September, 1927, and they continued in possession approximately a month before the contract was signed, and thereafter until the first of June, 1929. On June 1, 1929, they abandoned the premises, moved away

from Eugene to Portland, and made no payments on the contract subsequent to the payment due May 20, 1929. The suit was commenced August 7, 1929.

Plaintiff alleges default in making the payments and in failing to keep the premises insured, as provided by the contract, and that the payments made were no more than the rental value of the property. Defendants filed an amended answer and cross-complaint denying the alleged default on the contract and asking a rescission thereof and return of the money they paid and reimbursements for improvements made, and alleged that the contract had been procured by plaintiff through fraud and fraudulent concealment perpetrated by the plaintiff in that plaintiff concealed the fact as to latent defects in the building. The defendants do not claim that there was any active fraud in the misrepresentations, but claimed that the premises were not of the value that they expected and that they were worth no more than $4,500. The plaintiff has its principal office in the city of Portland and the defendants had ample opportunity to examine the premises, and they occupied the same for about a month before the contract was made and were really in a better position to know the condition thereof than the plaintiff was.

The trial court found that no fraud had been practiced on defendants, that there had been no fraudulent representations or concealment and that the defendants entered into the contract fully advised and informed as to the condition of the premises they were purchasing. The court allowed defendants sixty days from the date of the decree within which to pay the delinquent instalments and other sums due on the contract and, in default thereof, it decreed that a strict foreclosure of the contract be entered.

It appears from the evidence that defendants were negotiating with plaintiff for the purchase of the property the latter part of June, 1927, and were given the keys to the house for the purpose of inspection, and in September, approximately a month before the contract was signed, defendants moved into the premises; that the defendants found some fault with the condition of the house at the time they moved in and were allowed $72.50 for the repair of the heating system in the house, which was credited on the first cash payment, and that before the contract was signed the plaintiff advised defendants that it would no longer be responsible for any repairs required on the premises. The defendants discovered the alleged defects in the premises in the fall and winter of 1927, or early spring of 1928, but they continued in possession of the house and lot, continued making payments upon the contract thereafter and during the entire year of 1928 and continuously until May 20, 1929. In June they abandoned the property and apparently abandoned the contract and discontinued payments. Defendants did not make any claim against plaintiff or notify it of any defects in the property until July, 1929, when through their attorney they demanded of plaintiff $250 for a quitclaim deed from defendants. It is claimed on the part of defendants that as the contract provided that it should terminate upon a default that equity has no jurisdiction to foreclose the right of defendants and that there is no necessity therefor.

The simple fact that defendants demanded $250 for a quitclaim deed, and the further fact that in this case they claimed the right of rescission, shows clearly that plaintiff, in order to cancel the contract and be in a position to show its title clear in that respect, was

required to foreclose the contract. Jurisdiction resides in a court of equity in suits under executory contracts to enforce the lien of a vendor and foreclose the rights of delinquent vendees: *Security Savings Co. v. Mackenzie,* 33 Or. 209, 214 (52 P. 1046); *Flanagan Estate v. Great Cent. Land Co.,* 45 Or. 335, 342-344 (77 P. 485); *Maffet v. Or. & Cal. R. Co.,* 46 Or. 443, 451, 452 (80 P. 489). In the Flanagan Estate case, speaking of equitable conversion taking place in the execution of an executory contract, this court said:

"The conversion spoken of entails equitable remedies, hence the vendor may invoke equitable cognizance by foreclosure to cut off or bar the vendee's interest, it being an equity of redemption, on the supposition that that is done which ought to be done."

The claim that a demurrer would lie for want of jurisdiction of a court of equity cannot be maintained. There was no error in overruling the demurrer to the complaint.

Defendants claim that they are entitled, under the evidence, to a rescission of the contract. The defendants, upon the trial, admitted that all the defects and shortcomings of the property of which they are complaining were discovered by them in the fall of 1927 or early spring of 1928, but they made no complaint, neither at the time nor in the future, until in July, 1929, and during the intervening time and up until June, 1929, they continued to live on the premises and to make monthly payments on the contract.

Rescission by a vendee of a contract of sale demands reasonable promptness in action on the part of such vendee, claiming to be defrauded or overreached, and any unreasonable delay in asserting a disaffirmance of the contract would be considered as an election to treat it as continuing, or to affirm it:

2 Black on Rescission of Contracts, (2d Ed.) § 536, p. 1316; *Potter Realty Co. v. Breitling,* 79 Or. 293, 304, 305 (155 P. 179); *McCourt v. Johns,* 33 Or. 561, 569 (53 P. 601).

Any action on the part of the purchaser treating an executory contract as in force, when done with the knowledge of facts creating a right to rescind, amounts to a waiver of the right to rescind because of the existence of such facts: 39 Cyc. 1432; *James v. Ward,* 96 Or. 667, 676 (190 P. 1105); *Scott v. Walton,* 32 Or. 460, 464 (52 P. 180).

The representations made by plaintiff in regard to the house, of which complaint is made, were principally that the house was constructed at a low cost and that the defendants would obtain the benefit thereof, that it was a good buy, which is practically trade talk and an expression of opinion which defendant F. C. Getty, who is a salesman, would be in as good a position to determine as was the plaintiff.

A vendee of real property who has had opportunity to visit the premises and judge of its cost and value where all the circumstances are plainly disclosed by the vendor, as far as his knowledge extends, cannot rescind his contract to purchase because of fraudulent misrepresentations in those respects: *Helgeson v. Northwestern Trust Co.,* 103 Or. 1, 6, 7 (203 P. 586). By reason of the lapse or delay of the defendants in making their claim for rescission and their action treating the contract of sale as in force, with knowledge of all the conditions of the premises and considering the opportunity that they had to examine the premises and determine their condition and value, defendants are precluded from rescinding the contract. The contract provided, in substance, that upon

default in the payments by defendants the defendants should not be entitled to a return of any part of the payments or expenditures thereon.

The findings and decree of the trial court were correct.

The decree of the circuit court is affirmed.

Brown, Belt and Kelly, JJ., concur.

No. 1638—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM FRIBERG, *Appellant, v.* J. O. ELROD ET AL., *Respondents.*

Appeal from Circuit Court, Multnomah County.

ROBERT TUCKER, Judge.

Argued and submitted October 17, 1930.

Department 2.

*Harold V. Newlin* of Portland for appellant.

*Jay Bowerman* of Portland (Bowerman & Kavanaugh on brief) for respondents.

BEAN, C. J.

MODIFIED.

This is a suit to foreclose a mechanics' lien for labor performed under a written contract "to supply all skill, labor, plant and equipment and to perform all work necessary in the construction of a warehouse and a refrigerated storage house" upon certain real property known as the North Pacific Mills tract, situated in the city of Portland, Oregon. The contract was dated August 23, 1927, and was made between Elrod and Trimble, designated as the owners, and William Friberg, called the contractor. The record title to the real property is in the name of the defendant, Oregon Terminals Company, a corporation. The defendant, United States National Bank, a corporation, is trustee for certain bondholders and claims a mortgage lien upon said real property.

The contract provides for three classes of work: First, that set forth in the plans and specifications; second, additional work required to be done in con-

nection with that set forth in the plans and specifications and which may fairly be classed with this work; third, any other work not covered by the plans and specifications. The first two classes were to be paid for at the unit prices set out in the contract proposed and agreed upon by the parties; the third, at cost, plus 10 per cent.

The work was completed on December 24, 1927. Plaintiff claims a balance due and owing him from the defendant partnership for the work done upon the agreed unit basis in the sum of $1,525.74, plus $48, the agreed unit price for the construction of one large extra door, and a further sum of $22,708.20 for additional services performed at the instance and request of Elrod and Trimble, the partnership, in the construction of the buildings.

Plaintiff filed his claim for lien for the amount claimed and prays judgment against the partnership for the total amount and for a decree foreclosing the lien upon the real property mentioned. The answer of the defendant partnership alleges that by virtue of a contract with defendant, Oregon Terminals Company, to construct a ships' terminal on the real property owned by the Oregon Terminals Company, the partnership employed plaintiff to perform certain work and labor in connection with the construction of the buildings.

Defendants admit the completion of the work required of the plaintiff, which included certain alterations, changes and additions made during the construction of the buildings. The defendants deny any indebtedness to the plaintiff except the balance of $347, which is alleged to have been found and determined by the engineer in charge of the work, and contend further that the matters now in controversy

between the plaintiff and defendants have been adjudicated by the engineer. By way of counterclaim defendant partnership further alleges that plaintiff breached his contract in failing to remove the forms from certain concrete walls, employed incompetent workmen and supervisors, wasted lumber, failed to perform the work in a good workmanlike manner, wilfully destroyed valuable materials, failed to complete the contract within the time required, damaged one large door through negligence, failed to secure steel sash in office, in all aggregating a total loss, expense and damage to the partnership in the sum of $40,334.

The reply is a general denial of the affirmative matter of the answer and alleges further details in regard to the contract and work.

The trial court, with much care and detail, found in favor of plaintiff, that he recover from the defendants J. O. Elrod and J. H. Trimble the sum of $5,717.07, with interest, and the further sum of $8.20 for filing claim of lien, and the further sum of $500 attorney's fees, and decreed a foreclosure of plaintiff's lien for that amount. The court disallowed Elrod and Trimble's counterclaim. Plaintiff appeals from the decree of the circuit court.

BEAN, C. J. Section 5 of the contract provides as follows:

"The engineer shall be the sole judge of the sufficiency of the force employed, the suitability and capacity of any plant and the quality of the work done by the contractor or his employees."

Section 5 of the specifications, which are made a part of the contract, provides:

"All corrections of errors or omissions in the specifications or plans may be made by the engineer when such correction is necessary for the proper fulfillment of their intention as construed by him."

Section 11 of the specifications reads as follows:

"All disputes or disagreements between the parties hereto shall be submitted to and decided by the engineer and his decision shall be binding upon both parties."

It also contains the following provision:

"Any reasonable modification of the proposed plans which does not materially add to the cost of the work to the contractor or any work required because of omissions or incomplete plans shall be performed at the prices bid and without extra payment on account of such changes or omissions."

The plaintiff contends that by the express provisions of the contract the engineer's authority was limited and circumscribed to the general supervision of the work. Plaintiff further contends that the partnership failed to comply with their contract by neglecting to supply plaintiff with materials when required and failed to deliver the material on the floor of the dock as provided by the contract, resulting in great delay and expense to the plaintiff; that during the construction the plans and specifications were arbitrarily changed and altered so as to include extensive and costly additions to the work not originally contracted for; that defendants delayed the completion of certain preliminary work, such as the installation of piling and making of certain fills and laying of the dock floor, which delayed plaintiff in the construction of the buildings; that a roadway to the structure was not completed until about the 20th of September, 1927; that certain plans required for the apple storage house were not delivered by the partnership until the 20th of September, 1927, which delayed the construction of the apple storage house; that when the buildings were approximately one-half completed the defen-

dants ordered plaintiff to discontinue the construction under the old plans and specifications, and thereupon new plans and specifications were substituted; that structural iron and roof joists were not delivered when required; that construction was caused to be discontinued on account of the settling of fills; that certain changes were made in the bulkhead wall during construction, necessitating the reconstruction of forms; that extensive and costly changes were required to be made during the construction of a retaining wall; that defendants' conflicting orders interfered with the construction; that improper and inferior materials were supplied by defendants; that the plans were incomplete, all of which caused delay, great expense and damage to plaintiff.

The plaintiff contends that the contract has been materially modified by the parties in so many particulars as to be no longer controlling. We do not so find. Defendants contend the parties are bound by the express terms and conditions of their written contract.

The contract provided that any "supplemental agreements covering such work which may be made from time to time" are made a part of the contract. The contractor commenced the work about the 28th of August, 1927. The contract provided that the first payment should be made September 10, and payments should be made on each Saturday thereafter for the work done up to and including Thursday of the particular week. The estimated cost of the building was $62,000. Mr. Friberg rendered a bill September 17, 1927, for extra work done to that date, and it was paid. The foreman furnished some items of extra work of different dates at different times, but no statement of the cost plus work was rendered until about December 19, when the building was nearly completed.

Plaintiff presented a bill claiming cost plus for several items, many of which were rejected by the engineer who, by the terms of the contract, was to pass on such matters, and a claim of lien was filed in which the price per item was materially reduced. Friberg, in explaining why he presented claims to the partnership and afterwards filed a lien for different amounts, said it was done by his son, and stated: "A party told my son that you were dealing with a horse trader now and you had better make your bills accordingly, and you had better make them about double, so you can settle for half; and my son asked me whether he should do that or not. 'Well,' I says, 'that is poor policy to do it, but,' I says, 'you can try it.' "

On November 18 and November 21, 1927, Elrod and Trimble wrote Friberg that all bills for extras must be presented to Brown, the engineer, not later than Friday night of the week of November 18, and that thereafter all bills for extras must be presented to Brown for approval or rejection within three days of the performance of the work.

One of the main contentions of plaintiff is that the written contract made between the parties is not controlling for the reason that it has been deviated from in so many particulars, and so many changes, alterations and additions thereto were made and acquiesced in by the parties that there was a departure from the original contract.

The plaintiff's lien embraced in this foreclosure suit is based upon the written contract dated August 23, 1927, between plaintiff and Elrod and Trimble. The contract provides for the manner of arriving at the amount to be paid for the work to be performed by plaintiff. The plaintiff now claims that he is entitled to recover for work done which is not mentioned in

the contract of the parties, on the quantum meruit. The contract is, for work not coming within the unit price called for in the contract, that plaintiff should be compensated for the cost thereof plus 10 per cent.

Plaintiff's contention that the contract was so changed that the same was abandoned and abrogated, cannot be upheld. Plaintiff cites and quotes from *Hayden v. Astoria,* 74 Or. 525 (145 P. 1072), to sustain such contention. In that case, based upon the allegations of the complaint, this court followed the rule that where the original contract has been deviated from in so many matters that it cannot be regarded as controlling it must be considered as abrogated and the parties relegated to their implied rights, for a subsequent departure from the terms of a written contract by the parties, mutually acquiesced in, abrogates it to that extent. (Citing 4 Elliott, Contracts, § 3697.) The facts in the Hayden case are entirely different from those in the case at bar. Here provision is made in the contract that extra work should be paid for at cost, plus 10 per cent. No such provision was contained in the contract mentioned in the Hayden case. In the present case the contract was not abandoned by the parties. It was adhered to and this suit is based thereon. There is nothing in the Hayden case to indicate that one can make a contract and bring an action thereon and then claim that the contract has been so changed as to have been abrogated and recover upon a quantum meruit. The case of *Hayden v. Astoria* was again before this court, after a trial upon the merits, and was reported in 84 Or. 205 (164 P. 729), the opinion being written by Mr. Justice McCamant.

This case was tried before the circuit court upon the theory that plaintiff should recover upon the contract as set forth in the complaint and not that the

plaintiff could recover on quantum meruit. In the present case the contract contemplated extra work to be done and provided for the payment therefor. It also provided that the engineer should be the arbitrator in case of any dispute in regard to the contract between the parties. After the work was completed and the plaintiff on December 19, 1927, submitted his claim for work performed, W. G. Brown, the engineer, who supervised the work and was the arbitrator mentioned in the contract, made a final estimate of a large part of the work done by plaintiff under the contract, and in twenty-one different items estimated the work to be paid for at $62,016.83.

The estimate of an engineer and arbitrator in such a case may be impeached for fraud; that is, it may be shown that the engineer in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud or warrants the conclusion that the engineer did not exercise that degree of care, skill and good faith in the discharge of his duty, which the law exacts, and in either of such events the court will disregard the estimate so far as necessary to do substantial justice. The certificate of an engineer in such a case is termed an award: *Sweeney v. Jackson County,* 93 Or. 96, 116 (178 P. 365, 182 P. 380); see also *Mundy v. Louisville & N. R. Co.,* 67 Fed. 637 (14 C. C. A. 587). Where a contract stipulates that a certain engineer is expressly clothed with the broad authority to determine all questions arising in relation to the work, and in case of improper construction or failure to comply with the contract, to suspend the work and order the partial or entire reconstruction, or to declare the con-

tract forfeited, and provides that after the completion of the work the engineer shall make a final estimate of the amount of work done, and the value thereof to be paid by the builder, and determine all disputes, and for payments to be made on the engineer's certificate, the contract does not create a mere naked agreement to submit differences to arbitration, such stipulations are of the very essence of the contract, and such agreement is not subject to revocation by either party, and an award made by virtue of such contract provisions, and evidenced by the final certificate of the engineer, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding on both parties to the contract, in so far as it is confined to disputes actually subsisting and open to arbitration: *Sweeney v. Jackson County,* supra; *Memphis Trust Co. v. Brown-Ketchum Iron Works,* 166 Fed. 403, 405 (93 C. C. A. 162); *Sweeney v. U. S.,* 109 U. S. 618 (27 L. Ed. 1053, 3 Sup. Ct. Rep. 344).

In the present case the plaintiff has neither alleged nor proven that the engineer was guilty of any fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment in estimating that part of the work done by plaintiff to be paid for by Elrod and Trimble, which was considered and passed upon by him.

It is a well-settled rule that the theory adopted by the trial court, with the acquiescence of the parties, will be applied in the appellate court: *Durning v. Walz,* 42 Or. 109, 112 (71 P. 662); *Rasmussen v. Winters,* 82 Or. 674, 679 (162 P. 849); *Wallace v. American Life Ins. Co.,* 111 Or. 510, 525 (225 P. 192, 227 P. 465); *McVeagh v. Multnomah County,* 126 Or. 417, 424 (270 P. 502).

Sometime after December 24, when the building was completed, Friberg met with Brown to consider the various items on the building. The engineer allowed several items, as appears from the testimony, that were for extra work and not included in Friberg's claim, and it appears he made an honest endeavor to estimate the amount of a large part of the work in accordance with the terms of the contract. Several of the items, the cost of which could be determined with reasonable accuracy, were allowed by the trial court in its decree. The defendants do not appeal.

It appears from the record that there were some items which were not adjusted by the engineer, ranging from $1.60 to several hundred dollars, and that the determination of the amounts to be allowed for cost plus work was postponed. At the time the final claim was made, December 19, there was a disagreement. It seems there was not a very strenuous endeavor upon the part of either the plaintiff or the engineer to arrive at an agreement. They practically agreed to disagree. These various items were mostly occasioned by changes made in the plans or omissions from the plans and specifications. We have, therefore, carefully examined the testimony in regard to some forty-seven disputed items which were not allowed by the circuit court.

A careful reading of the testimony convinces us that, while the entire claim of plaintiff should not be allowed, under the contract and according to equity plaintiff should be allowed some additional compensation on the items which we have examined, and referred to in the court's findings on pages 173 to 176, inclusive, of the abstract of record. The decree of the circuit court will, therefore, be modified by allowing, on several of these items, an additional amount of $1,292.02.

We think the proper amount of land necessary to be used in connection with the buildings constructed was allowed by the circuit court. Considering all the record, the finding in regard to attorneys' fees made by the trial court will not be disturbed.

With the modification above mentioned, the decree of the circuit court is affirmed.

BROWN and BELT, JJ., concur.

No. 1639—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

W. M. LANE ET UX., *Husband and Wife, Appellants, v.* J. W. BEVERIDGE ET AL., *Respondents.*

Appeal from Circuit Court, Multnomah County.

ROBERT TUCKER, Judge.

Argued and submitted October 16, 1930.

Department 2.

*McDannell Brown* for appellants.

*W. H. Morrison* for respondents (Barry & Morrison on brief).

BEAN, C. J.

AFFIRMED.

BEAN, C. J. This action was brought by plaintiffs against Joseph W. Beveridge, county clerk of Multnomah county, Oregon, and National Surety Company, a corporation, his surety. The action is based on alleged negligence on the part of defendant Joseph W. Beveridge in failing to docket a decree of foreclosure and in failing to docket the deficiency judgment in a suit entitled *W. M. Lane and Elizabeth Lane v. J. E. Shears and Mary Shears and Josephine Evans and H. C. Keck.* A demurrer to the complaint was interposed by defendants, which was sustained by the trial court, and upon plaintiff's declining to further plead the action was dismissed.

After alleging the official character of defendant Joseph W. Beveridge and the corporate character of the surety company and that the surety company executed a bond in the penal sum of $25,000, as surety, for the faithful performance of the duties of county

clerk, the complaint alleges, in substance, the following: That about December 22, 1924, these plaintiffs commenced a suit against J. E. Shears and Mary Shears et al. for the foreclosure of a certain mortgage given by defendants J. E. Shears and Mary Shears to secure their promissory notes held by plaintiffs; that thereafter, about December 31, 1925, judgment and decree was duly made and entered in said cause, a copy of which decree is attached to the complaint as an exhibit; that plaintiffs, in order to protect their interests in said judgment, were required to and did purchase from defendant Josephine Evans, in said former suit, all of her rights and interests in said judgment and took an assignment and are now the owners thereof; that the judgment and decree was entered in the fee book as part of the records of said court; that said defendant Joseph W. Beveridge neglected to docket said judgment and decree or to index the same in the judgment lien docket of Multnomah county, as required by law; that thereafter "the said defendant duly and regularly issued an execution, directed to the sheriff of Multnomah county, Oregon, upon said judgment and decree, and ordered a sale of the property of the said J. E. Shears and Mary Shears, described in said decree, to satisfy the said judgment"; that by virtue thereof the sheriff of Multnomah county sold the property on February 16, 1926, for the sum of $3,961.75 over and above the costs of sale, as required by law, and returned said sum to the defendant Joseph W. Beveridge and duly executed his return, showing said sale upon execution, and filed the same with said defendant; that upon filing said return said Joseph W. Beveridge negligently and carelessly failed and neglected to docket any deficiency judgment in the lien docket of Multnomah county in favor of these plain-

tiffs and against said J. E. Shears and Mary Shears; that a copy of said execution is attached to the complaint; that on December 31, 1925, and up until June 14, 1926, the defendants J. E. Shears and Mary Shears were the owners of certain real property situate in the county of Multnomah, describing the same, which real property was of the reasonable value of $1,250; that by reason of defendant Joseph W. Beveridge's neglect and failure of duty, as set forth, plaintiffs acquired no lien upon or against said real property; that on June 14, 1926, J. E. Shears and Mary Shears conveyed the real property to one Fironia E. Washburn, whom plaintiffs believe had no notice or knowledge of plaintiff's decree against her grantor; that the Shears have no property within Multnomah county subject to execution; that an execution was "issued out of this court" against any property of the Shears and has been returned *nulla bona;* that plaintiffs have been damaged in the sum of $1,250, and pray judgment for said amount.

An examination of the decree in the foreclosure suit mentioned discloses that a decree was rendered in favor of defendant Josephine Evans against J. E. Shears and Mary Shears upon a promissory note and money expended under the terms of the mortgage given to secure the same in the sum of $3,681.50, with interest, and $400 attorney's fees as a first lien upon the mortgaged property.

It was further decreed that there was due and owing plaintiffs herein by defendants J. E. Shears and Mary Shears upon the promissory notes set out in the complaint the sum of $283.33, with interest at 10 per cent. per annum from January 1, 1924, and $500, with interest at 10 per cent per annum from August 1, 1923, and

$200 reasonable attorney's fees; that said amounts are a valid second lien upon the premises hereinafter set forth and described, subject only to the claim of lien of Josephine Evans as set forth therein, which amount is secured by the mortgage set forth in the complaint; that the conditions of the mortgage have been broken and both of the mortgages should be foreclosed and the premises sold "and the proceeds arising from such sale applied to and upon the payment of said sum of money due Josephine Evans as aforesaid and the balance, if any, to said sum as aforesaid due to the said plaintiffs as aforesaid who hold said second mortgage."

It was further decreed that the mortgaged premises be sold and out of the proceeds the sheriff retain his fees and pay the defendant Josephine Evans or her attorney the $400 attorney's fees and the further sum of $3,681.50, the amount due upon her mortgage, with interest, and if there be any balance, same to be paid into the clerk's office to be disposed of as the court may direct and foreclosing the other defendants W. M. Lane and Elizabeth Lane and all persons claiming under them of any and all equity of redemption through said mortgaged premises. The decree further provided that if the money arising from the sale should be insufficient to pay the amount due the defendant Josephine Evans, with interest and costs, the sheriff specify the amount of such deficiency and balance due to the defendant Josephine Evans in his return of sale "and that on the coming in and filing of said return, the clerk of this court docket a judgment for such balance against the defendant, J. E. Shears and Mary Shears," and that said defendants pay to said defendant Josephine Evans the amount of said deficiency and judgment with interest. The decree described the land to be sold.

A careful examination of the decree in the foreclosure suit discloses that, while the amount due plaintiffs W. M. Lane and Elizabeth Lane upon their second mortgage was determined by the court in the decree and the mortgaged property was ordered to be sold to satisfy the amount, there was no judgment entered for the amount due upon plaintiffs' mortgage for the total amount, and there was no deficiency judgment ordered in favor of these plaintiffs. In framing the decree it appears to have been contemplated that the sale upon foreclosure would only satisfy the claim of defendant Josephine Evans, who held the prior lien.

The plaintiffs were not prejudiced by the fact that the original decree was not docketed as that decree did not provide for judgment against J. E. Shears and Mary Shears for the amount of plaintiffs' mortgage indebtedness. It also provided for the sale of the property and made the docketing of a deficiency judgment in favor of defendant Josephine Evans contingent upon the sheriff filing a return specifying the deficiency. The county clerk cannot be charged with the negligence of the parties in the foreclosure suit in failing to foreclose the property according to the statute. That negligence, if any, was the act of the agent of plaintiffs in this suit and is chargeable to the plaintiffs. The duties of the clerk of the county and circuit courts are prescribed by section 27-2008, Oregon Code 1930, one of which is: "To keep the journal of the proceedings of the court at its terms, and under the direction of the court, to enter its orders, judgments, and decrees."

The decree in the foreclosure suit did not provide for judgment against J. E. Shears and Mary Shears; therefore it did not constitute a lien against the property. The only provision we find is that the property be sold and if the sheriff's return showed a deficiency in favor of Josephine Evans that a deficiency judgment

be docketed. The docketing of that decree would not have created a lien against the property and the failure to docket same would not contribute to the damage, if any, that plaintiffs sustained. It appears that the county clerk complied in every respect with the decree of the court in the foreclosure suit. The complaint does not state facts sufficient to constitute a cause of action. The demurrer was properly sustained.

Judgment of the trial court is affirmed.

Brown, Belt and Campbell, JJ., concur.

No. 1640—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

MARIE AMEND, *Appellant,* v. THEODORE C. AMEND, *Respondent.*

Appeal from Circuit Court, Marion County.

L. H. McMahan, Judge.

Argued and submitted January 14, 1931.

Department 1.

*Guy O. Smith* of Salem for appellant.

*W. C. Winslow* of Salem for respondent.

Rand, J.

Reversed.

RAND, J. Plaintiff commenced this suit for divorce on the ground of cruel and inhuman treatment. Defendant answered, denying the acts of cruelty alleged in the complaint and prayed for a divorce upon the ground that plaintiff had committed adultery on October 27, 1928, with one Newt Ellis, which charge was denied by the reply. Upon the issues thus joined, the cause was tried in the court below and, from a decree in favor of defendant, plaintiff has appealed.

It appears from the evidence that the parties intermarried at St. Paul, Minnesota, on October 1, 1914, and later removed to Oregon, where they have since resided on a farm near Salem, and that there are three minor children, the fruits of the marriage. There was evidence offered upon the trial tending to show that defendant had committed the acts of cruelty charged in the complaint, There was also evidence offered by defendant as a witness in his own behalf that on October 27, 1928, he had been personally present and had seen acts done

by plaintiff and Newt Ellis which convinced him that plaintiff had committed adultery with Ellis at said time. There is no other specific act of adultery charged in the answer or testified to by any witness, although there was a general charge made by the answer that plaintiff had committed acts of adultery with Ellis previously at times and places unknown to defendant. It also appeared from the evidence that on or about November 1, 1928, because of their marital troubles, plaintiff left defendant, remained away from him until January 1, 1929, when a complete reconciliation took place and they resumed their marital relations with each other and thereafter for a short time lived and cohabited together as husband and wife. Both parties so testified. The specific allegation contained in the complaint in respect to this reconciliation and agreement to condone is as follows:

"That on account of the conduct of the defendant herein plaintiff left said defendant in about the month of November, 1928, and remained away from him until the 1st day of January, 1929, at which time a complete reconciliation between said parties was effected, and at said time the plaintiff herein expressly forgave the defendant for his past ill treatment and agreed to return to their home and resume the marital relations on condition that said offenses should not be repeated by the defendant."

Then follows an allegation of defendant's promise to not repeat his former offenses and his failure to perform the terms of his agreement by cursing and swearing at her, calling her vile and indecent names, and accusing her of having committed the crime of adultery. The specific allegation contained in the answer is as follows:

"That thereafter and about the 1st day of January, 1929, a reconciliation was perfected between plaintiff

and defendant, and plaintiff returned to the home of defendant and lived with defendant for a while as defendant's wife."

Following which is an allegation that it was a term of the agreement that plaintiff should discontinue associating with other men and should attend to the duties she owed to the children and to the defendant, and that she had failed to perform the agreement by associating secretly and without his consent with other men.

A careful examination of the entire testimony in the case shows a total want of any evidence of such association or of any imprudent or wrongful act done by plaintiff after the reconciliation had been effected and the marriage relations had been resumed. As said by this court in *Eggerth v. Eggerth,* 15 Or. 626:

"Condonation is a conditional forgiveness, the condition being that the offense shall not be repeated. If the charge or offense be repeated, then the condonation is to be deemed withdrawn or avoided, and the plaintiff may avail herself of the facts alleged to have been condoned, just as if no condonation occurred."

It is the conditional forgiveness or remission by a husband or wife of a matrimonial offense which the other has committed and the condition is that the offense will not be repeated and that the offender will thereafter treat the injured spouse with conjugal kindness, and while the condition remains unbroken the condonation is an absolute bar to the remedy for the particular injury condoned: *Saville v. Saville,* 103 Or. 117 (203 P. 584), and authorities there cited. Or, as stated by Bishop, in 1 Bish. on Marriage and Divorce, 1st ed., §§ 269 and 308:

"Condonation is the remission, by one of the married parties, of an offense which he knows the other

has committed against the marriage, on the condition of being continually afterward treated by the other with conjugal kindness,—resulting in the rule that while the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy.''

Hence, so far as entitling defendant to a divorce because of the offense charged to have been committed by plaintiff on October 27, 1928, if committed as contended for, it is wholly immaterial whether plaintiff was guilty of the offense charged or not, for the facts were known to the defendant and the offense, if committed, was condoned by by the subsequent voluntary cohabitation between the parties and this operates as a complete bar of any remedy for the condoned offense unless the matters to which we now refer operate to remove the bar.

In the instant suit the plaintiff did not admit the adultery and plead condonation in bar of the suit but she denied the adultery and pleaded condonation. Section 6-911, Oregon Code 1930, provides that:

''In a suit for the dissolution of the marriage contract on account of adultery, the defendant may admit the adultery, and show in bar of the suit, either,— * * * 2. That the act has been expressly forgiven, or impliedly so, by the voluntary cohabitation of the parties after knowledge thereof.''

In *Rice v. Rice,* 13 Or. 337, where the suit was not based upon a charge of adultery and the question arose upon the demurrer to the complaint, the court, in construing this statute, said inter alia:

''* * * The language of the statute is that 'the defendant may admit the charge, and show in bar of the suit,' etc.—that is, admit the truth of the facts charged as facts, and show other facts in bar—confess and avoid.''

In *Eggerth v. Eggerth,* supra, Mr. Justice STRAHAN, speaking for the court, said:

"The special defenses provided for in this section are only available when the answer expressly admits the charges in the complaint (*Rice v. Rice,* 13 Or. 337), and cannot be joined in an answer which denies all of such charges. For the purposes of the suit a demurrer admits all facts which are well pleaded in the pleading demurred to; but in *Rice v. Rice,* supra, this court held that such admission must be by answer, and therefore a demurrer did not present the special defense in that case that the suit had not been commenced within one year after the right accrued. This view renders unavailable in this case the special matter relied upon by the defendant as well as the state."

According to the decision in *Rice v. Rice,* it was held that before condonation could be available as a defense the defendant must first admit the charge and then allege the facts constituting the condonation; in other words, must confess and avoid, and in the Rice case it was held that the admission and the avoidance must both be alleged in the same pleading. Under those decisions, both elements were essential; that is, there must be both an admission as to the truth of the charge and a statement of the facts constituting the condonation. Hence, if, under the statute, one is not necessary to be pleaded, the other is also unnecessary for the same reason. The two decisions referred to have not since been followed in this court and a contrary rule has been announced in *Hill v. Hill,* 24 Or. 416, in which Mr. Justice BEAN, speaking for the court, said:

"The accusation of adultery, so far as this testimony discloses, if made at all, may have been made at any time during the married life of the parties, and have been fully condoned by subsequent cohabitation, and if this be so the plaintiff is not entitled to a decree of divorce; although the defendant has not pleaded

the condonation: Stewart on Marriage and Divorce, § 311, 2 Bishop on Marriage, Divorce, and Separation, § 631; *North v. North,* 5 Mass. 320."

The reason for that decision is based upon the rule announced by Bishop which was cited but not quoted in the opinion. It reads as follows:

"By reason of the suit being triangular, and the public being a party to it, a fact of condonation appearing is fatal to the plaintiff's claim, though the defendant has not pleaded it; not because the latter has any just right to take the objection, but because public policy does not permit the divorce. And the public, which does not plead, objects through the conscience of the judge. Chancellor Walworth went so far as to say that if there is reason to believe this defense exists, the court, ex officio, may at any time before a final decree direct an inquiry to ascertain the fact."

That ruling that facts constituting the condonation do not have to be pleaded was followed and applied in *Saville v. Saville,* supra, and *Kruschke v. Kruschke,* 103 Or. 601 (205 P. 973). In the first of the two cases last cited Mr. Justice McCourt, speaking for the court, said:

"Where it is clearly shown by the evidence that a matrimonial offense has been condoned, the court may deny a decree of divorce, although defendant has not pleaded the condonation."

And in the last case he announced the same doctrine in practically the same words.

It is a rule of general application in divorce cases that "public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner prescribed and for the causes specified by the law": 19 C. J., p. 20; *Jones v. Jones,* 59 Or. 308 (117 P. 414); *Parrish v. Parrish,* 52

Or. 160 (96 P. 1066). Hence, under the decision in *Hill v. Hill,* supra, and the two latter cases referred to, where condonation of a matrimonial offense has been established by the evidence and the offense is not shown to have been repeated, it is the duty of the court to refuse a decree for the particular act condoned, whether the offense itself be admitted or denied and whether the condonation be pleaded or not.

From this it follows that since defendant had the same knowledge of the facts at the time the reconciliation took place and cohabitation was resumed that he had while on the witness stand in the trial of the cause and failed to show a repetition of the offense complained of he is barred from asserting the act condoned as a ground for divorce in the instant case.

Nor is the plaintiff in a much better situation. She alleged in her complaint that she expressly agreed to condone all previous acts of cruelty committed against her by defendant prior to the time she resumed her marital relations with defendant. On her direct testimony, she testified as follows:

"Q. Do you think you can possibly forget these differences and go back and live together again? A. No, before the first of March we had a thorough understanding, I told him I would have to leave if he didn't stop throwing up when he would get mad at me that I had committed adultery with Newt Ellis, and after he was over it he would say he didn't believe it, and it would be the same thing over again afterwards, so it is impossible for us to live together."

On cross-examination, she modified this by stating:

"No, he didn't accuse me of adultery again, but he said 'How will I know but what you will if I let you go with your friends?' "

Assuming that plaintiff's testimony was sufficient to show that defendant, after resuming his marital relations with her, was guilty of other acts of cruelty and that thereby the condition on which the plaintiff had condoned his previous offenses was broken, nevertheless we are of the opinion that plaintiff is not entitled to a decree of divorce. The evidence shows that, although plaintiff may not have been guilty of adultery, yet there has been misconduct upon her part which bars her suit for divorce. See *Thomsen v. Thomsen,* 128 Or. 622 (275 P. 673), and authorities there cited.

This leads to the only question remaining in the case. The record shows that upon a proper showing made in the court below that court entered an order requiring the defendant to pay to the clerk of the court $150 to enable plaintiff to prosecute the suit. No part of this sum has been paid. The order of the trial court requiring said sum to be paid will be affirmed and the suit will be dismissed as to both plaintiff and defendant, but plaintiff will be awarded her costs and disbursements in this and the circuit court, and defendant will be required to pay said sum to the clerk of the court below as attorney's fees. A decree will be entered accordingly.

Bean, C. J., Brown and Kelly, JJ., concur.

No. 1641—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

ROSE GOLDFOOT, *Respondent, v.* MABEL W. LOFGREN, *Appellant.*

Appeal from Circuit Court, Multnomah County.

JACOB KANZLER, Judge.

Argued and submitted October 22, 1930.

Department 1.

*John S. Coke* for appellant (Griffith, Peck & Coke on brief).

*E. M. Morton* and *Robert L. Jewell* for respondent (Morton & Littlefield on brief).

ROSSMAN, J.

AFFIRMED.

The complaint avers that the defendant, who operates a small private hospital in Portland, so negligently attended to the plaintiff's care, after her services had been engaged and the plaintiff had been subjected to a surgical operation for the removal of her tonsils, that infected blood from the incisions was aspirated into plaintiff's lungs causing two large abscesses to form therein. Specifically the complaint charges defendant with negligence in the following particulars: (1) Failure to provide a competent nurse for the care of the plaintiff; (2) failure to give the plaintiff proper care and attention; (3) failure to prevent the insufflation of infected matter into the lungs; (4) neglect to supervise the plaintiff, while she was recovering consciousness, by keeping her lying upon her side with her head in a sufficiently low position so as to cause the blood, flowing from the incision and vomiting from her stomach,



Sig. 2

to ooze out of her mouth; and (5) permitting the plaintiff to remain unattended for long periods of time while still unconscious. The answer admits that the defendant operated a small surgical hospital "and that in the said operation a considerable time was necessary and during said time a considerable amount of blood flowed from the point of the severed tonsils and much of said blood was swallowed by plaintiff, causing her to become nauseated and to vomit, and that some of the blood from said source was breathed or drawn into plaintiff's lungs during the time of said operation; that plaintiff's tonsils were infected and diseased and that the infection therein was conveyed to plaintiff's lungs through the fact that infected blood from said tonsils was breathed or drawn into plaintiff's lungs as aforesaid." It avers that the defendant received in her hospital patients only "where prior arrangements therefor" were made by the physician in charge of the patient, and that the defendant "usually gives to the cases brought to said hospital her personal services, and defendant denies that she held herself out as providing in said hospital skilled nurses for patients of various doctors." The answer, after denying that arrangements had been effected for the entry of the plaintiff into the hospital, denies all charges of negligence. From a judgment, based upon a verdict, in favor of the plaintiff in the sum of $2,500 the defendant appealed and presents eight assignments of error.

ROSSMAN, J. The first assignment of error contends that the circuit court erred when it overruled defendant's objection to a hypothetical question submitted to two medical experts called by the plaintiff. The question purported to outline the history of the infection that developed in the plaintiff's lungs as it

had previously been narrated by the plaintiff and her witnesses. This question is too long for quotation; but a sufficient understanding of its nature can be gained from the following synopsis of its more important recitals: It requested the witness to assume that the operation was performed while the plaintiff was under the influence of general anaesthetic; that while her tonsils were being removed she was lying upon her back upon an operating table so tilted that her head was lower than the rest of her body and her face was turned to one side so as to permit the blood to flow out of her mouth; no more bleeding than the normal amount occurred; the surgeon used sponges to stanch the flow of blood, and to prevent it from entering her throat; no vomiting or coughing occurred during the course of the operation; when the plaintiff was removed to a bed in one of the other rooms of the hospital her throat was dry of blood; the physician placed her upon her side upon the bed with head in a lowered position, a pillow to her back; the nurse did not remain in the room with the plaintiff; a few moments later the plaintiff, while still under the influence of the anaesthetic, and while still unattended by a nurse, but while sitting up in the bed, had a vomiting spell during which she expelled a clot of blood, and that she "threshed about at times and at other times lay upon her back while the incisions were still bleeding." The objection to this question was thus expressed:

"The witness is not competent to testify upon that question. The question does not contain a correct basis, as a hypothetical question, and does not correctly state the facts proven, and that the question is incompetent, irrelevant and immaterial; and furthermore, that the question calls for an answer from this witness which involves the very thing the jury is called upon to determine; it calls for the opinion of the witness as to what

was the cause of the alleged damage. Now, that is a question for the jury, and not for the witness, and we think it is improper on that ground."

The question concluded with the inquiry: "State whether in your opinion the abscesses would be likely to have been caused by the infected blood drawn into the lungs." The first witness replied: "I would say yes, due to the fact that * * *." Dr. Bueermann replied: "Certainly one is led to the conclusion,—cause and effect,—that the abscesses in this particular hypothetical question that you mention must be due to the factors preceding the abscesses, in this particular instance, the aspiration of blood or mucus." Each witness, after he had replied to the aforementioned question, was asked: "Having in mind the same facts which you have been asked to assume about this patient state when, in your opinion, the aspiration of blood into the patient's lungs would be most likely to have occurred." Substantially the same objection was made to this question as to the preceding one. The first witness replied that it was "most likely" to have occurred in the post-operative period while "the patient is coming out from under the anaesthetic" and is "struggling around and when the vomiting, due to the anaesthetic occurs." The second witness, after explaining that the bronchial tubes, being very sensitive to any extraneous foreign material, cause paroxysms of coughing to occur the moment any such substance is inhaled into them, expressed the belief that the absence of coughing during the operation, but its presence when the patient was struggling about on the bed, was a strongly persuasive circumstance indicating that at that time the infected blood entered the lungs. He concluded his reply as follows: "I would say that it most likely occurred during the time that this coughing spell was on,

when the presence of blood and mucus was in the posterior pharynx, the back of the throat, and where the constant choking and straining in an attempt to get air there, and expel again that which had been taken in along with air occurred, and that, in my opinion, would be the period in this particular hypothetical case, when this occurred, and I believe it occurred during the post-operative period." Following the above reply Dr. Bueermann was asked whether the attention of a competent nurse, while the patient was recovering consciousness, would have prevented the entry of the infected blood into the lungs. The defendant objected that the question was incompetent, irrelevant and immaterial. The witness replied: "I believe the probabilities of any aspiration occurring would certainly be reduced to a minimum."

We do not believe that the defendant's objections pointed out to the circuit court any reason for holding the questions improper. The general objection "incompetent, irrelevant and immaterial" is not a favorite of the law and is sustained only when the question is obviously improper: *Hamilton v. Kelsey,* 126 Or. 26 (268 P. 750); *Wallace v. Am. Toll Bridge Co.,* 124 Or. 177 (264 P. 351), and *State v. Wye,* 123 Or. 595 (263 P. 60). Certainly the information sought by the aforementioned questions was not immaterial, and hence the questions were not subject to this objection. We come now to the portion of the objection which contended "the witness is not competent to testify." Each witness in support of his competency testified to his familiarity with tonsillotomies, which we understand is the medical title applied to this type of operation. Dr. Phillips, one of the two who was apparently a very young man, testified that he had performed "about 150 tonsillotomies;" the competency of Dr. Bueermann was not

disputed. Whether an alleged expert possesses sufficient experience to render his opinions valuable and, therefore, admissible, is generally intrusted to the discretion of the trial court; its rulings will not be disturbed on appeal unless it appears that the discretion has been abused: Wigmore on Evidence, 2d ed., § 561 (citing Oregon decisions).

We come now to the next subdivision of the objection which argues that the hypothetical question "does not contain a correct basis * * * and does not correctly state the facts proven." The hypothetical question was predicated upon extensive preceding testimony which described the plaintiff's condition both before and after the tonsil operation, and it apparently endeavored to faithfully state the essence of this evidence as the hypothesis for the answer. Neither appellant's objection nor her brief points out any fact omitted by the question, but we find that although the plaintiff and the physician, who removed her tonsils, described her condition prior to the operation, briefly, the question made no mention of this fact. The plaintiff testified that before the tonsil operation she had been in good health but "felt as though I had a cold," and her physician testified that his examination of her disclosed "she had endocervicitis, and a little run down, infected tonsils." He explained that an endocervicitis is an "inflammation of the cervix." As previously indicated the testimony just mentioned was not incorporated in the hypothetical question. No matter how earnestly an attorney may endeavor to incorporate in a hypothetical question all facts which should be embodied in it he may omit inadvertently some item, especially if the preceding evidence has been extensive and has concerned itself with many details or incidents. Where counsel in good faith endeavor to incorporate

all of the essential facts into the hypothetical question a general objection that the question does not correctly state the facts is not sufficient: *Hamilton v. Kelsey,* 126 Or. 26 (268 P. 750). But even if the objection could be deemed sufficient and if the circuit court's ruling should be regarded as erroneous, the error was rendered harmless by the defendant's cross-examination of Dr. Bueermann. This physician, whose competency was conceded, stated that a mere cold would not cause an abscess to form in the lungs, and when asked whether "an inflamed cervix might cause an abscess on the lungs" replied: "No, I don't believe that could. At least, the cases that I know of in literature and familiar with have been reported, no such base has been reported, as far as I know."

The last contention presented by the objection is "that the question calls for an answer from this witness which involves the very thing the jury is called upon to determine." In support of this objection the defendant argues, among other matters "when these doctors testified as to when the aspiration of blood into the lungs took place they were usurping the province of the jury." It is impossible for a witness to usurp the province of the jury by merely expressing an opinion upon the very issue before it. His credibility, the soundness of his judgment, and the existence of the facts recited in the hypothetical question, upon which the opinion is predicated, always remain for the jury's determination, and unless all of them are resolved by the jury favorably to the proponent of the witness the latter's opinion will go for naught. See Wigmore on Evidence, 2 ed., § 1921. A good illustration of the lack of merit to objections of this type is afforded in the trial of condemnation cases brought under the power of eminent domain. In such proceedings generally the

only question presented for the jury's determination is the amount to be paid and yet the opinions of experts are freely received upon that question because they are helpful to the jury. But this much reiterated phrase serves a good purpose. It cautions counsel to confine the hypothetical question to the specific issue upon which an expert's opinion is really admissible and it has a tendency to break up the question into a sufficient number of parts so that the expert's answer will be as serviceable as possible to the jury. In other words the answers come as opinions upon details and not as conclusions upon the merits of the case. In the present instance the proper practice was followed. The two expert witnesses testified that in their opinion the infected blood from the tonsils, which the answer conceded was insufflated into the plaintiff's lungs, was the cause of the abscesses, and that in their opinion it entered the lungs while the patient was recovering consciousness. In addition one of them testified that the attention of a competent nurse would have reduced the possibility of aspiration of blood into the lungs to the minimum. Since the subject-matter of this opinion evidence consisted of practical knowledge with which a surgeon is much more familiar than the ordinary juror, the inquiries concerned proper material for expert testimony. When the witnesses had thus expressed themselves they had not invaded the province of the jurors. There still remained for the jury's determination the conflict between the testimony of the plaintiff's experts and those produced by the defendant; likewise the opinions of Drs. Phillips and Bueermann would be discarded unless the jurors were impressed with the credibility of these witnesses and were persuaded that their opinions were sound; and finally since the opinions were predicated upon a hy-

pothesis there remained for the jury's determination the question whether a preponderance of the evidence substantiated the hypothesis. Hence, we conclude that this portion of the objection is without merit.

We now come to the next assignments of error which contend that the motions for a nonsuit and for a directed verdict were erroneously denied. The essence of these contentions is that the verdict of the jury was founded upon speculation and conjecture. Preliminary to this argument it is contended that the proof failed to show that the defendant had contracted for the use of her hospital. However, since substantial evidence supports the jury's finding in favor of the plaintiff upon this issue we are bound by the verdict. Hence we proceed to the problem whether the jury's conclusions that the defendant was negligent, and that such negligence was the proximate cause of plaintiff's illness, are supported only by speculation and conjecture. The attendant supplied by the defendant had been in her employ for several weeks only, had had no experience in any other hospital, and had had no training as a nurse. Her knowledge of how to care for a patient recovering from a tonsil operation had been acquired while she observed seven or eight previous tonsillotomies in defendant's hospital. Besides caring for the plaintiff she also busied herself with the task of cleaning some surgical appliances. The only person present when plaintiff was recovering consciousness was the plaintiff's husband and this attendant. These being the facts we believe that the jury could reasonably infer that this young lady was incompetent to perform nursing service. Plaintiff's husband testified that while the plaintiff "was thresh-ing around on the bed," with blood oozing from her mouth, the attendant was absent, and that he sought

two or three times to locate her, without success. He swore that on the few occasions when she entered the room she remained for only a moment and did nothing more than to change the bed sheet. This evidence may be untrue, but the jury's favorable reception of it makes it incumbent that we should regard it as the truth. All witnesses agreed that while the patient is recovering consciousness, a competent nurse should be in attendance and should keep the patient upon her side with her head in such a low position that the blood and mucus will run out of her mouth. Since the plaintiff's husband testified that the attendant made no effort whatever to keep the plaintiff in such a position it is evident that the jury was warranted in concluding that the defendant was negligent.

But the principal contention advanced by the defendant does not concern itself with the existence of negligence, but with proximate cause. She argues that the proof renders a conclusion equally reasonable that the blood entered the lungs during the course of the operation, when the patient was in charge of her physician, as in the period following it, and further that the evidence failed to show that various other causes, capable of producing lung abscesses, did not cause these. In order to become entitled to a judgment it was necessary for the plaintiff to prove that the negligence of the defendant was the proximate cause of plaintiff's illness; in other words, to establish a causal connection between the two. It is true that no witness saw the aspiration of infected matter into the lungs in the post-operative period, and the formation of the abscesses as the result thereof. Nevertheless, the occurrences in the defendant's hospital, the manner in which nurses ordinarily care for patients recovering consciousness after tonsil operations, and the

opinions of the experts, constituted the proper subject-matter of study by the jurors for the purpose of determining whether or not an inference that the alleged negligence caused the abscesses to develop, and, in case they became satisfied that such an inference was reasonable, to next determine whether or not such inference was the only one which could fairly and reasonably be drawn from the facts. We have held that if the facts are as consistent with the appellant's theory as with the respondents, the plaintiff should be nonsuited: *Lippold v. Kidd,* 126 Or. 160 (269 P. 210, 59 A. L. R. 875), and *Spain v. O.-W. R. & N. Co.,* 78 Or. 355 (153 P. 470, Ann. Cas. 1917E 1104). It is not sufficient for the plaintiff to show that the negligence of the defendant might have caused the formation of the abscesses, if the evidence indicated an equal probability that they were due to some other cause. It was incumbent upon the plaintiff to show that of the various causes the one for which the defendant was responsible was the most probable (*Lippold v. Kidd,* supra); because to require less of the plaintiff would permit the jury to resort to speculation. But we believe, from the evidence which we shall now briefly review, that the proof indicated with reasonable certainty that the cause for which the defendant was responsible was the proximate one of plaintiff's subsequent ill health. The principal contention of the defendant was that the infected material was breathed into the lungs while the plaintiff's physician was removing her tonsils. We have already mentioned in part the testimony which rebutted this contention and which indicated that under the facts of this case it was very unlikely that the blood was drawn into the lungs during the course of the operation. Other possible causes are thus disposed of: It developed during the defendant's cross-examination of Dr. Bueermann that a "septic

embolus from other portions of the body'' can cause abscesses to develop in the lungs, provided, an infection, as for instance an infected hernia, exists in some other portion of the body and a diffusion of the infected blood causes an embolus to enter a severed vein. But no such infected area existed in the plaintiff's body unless the invested tonsils could be deemed such. Dr. Bueermann, in an explanation too lengthy for quotation, denied that infection from the tonsils could enter the lungs. He added that he knew of no case where an abscess of the lungs had been caused by a diseased condition of the tonsils. His testimony was not contradicted by any other witness. As we have previously pointed out he testified that an infected cervix had never been known to cause an abscess of the lungs. Further, upon cross-examination, he explained that the infectious organisms of the air, ''streptococcus and stophylococcus,'' are possible causes of abscesses of the lungs only when they are preceded by pneumonia, bronchitis, or a similar illness. in like manner all other possible causes of the lung abscesses were sufficiently negatived so that the defendant's alleged negligence remained as the only cause which could be deemed probable and established with reasonable certainty. Most of this proof was elicited from the plaintiff's witnesses by cross-examination and none of it was contradicted by any other witness. The question now occurs whether the jury's conclusion that the defendant's negligence was the proximate cause of plaintiff's illness is substantiated by facts, or whether it came only as the result of conjecture and speculation. It is difficult to define precisely the boundary line between conjecture and fact-reasoning. The former, according to the Alabama court (*Southern Ry. Co. v. Dickson,* 211 Ala. 481; 100 So. 665), is ''simply an explanation consistent with known facts and condi-

tions, but not deducible from them as a reasonable inference." The same court suggests that when the evidence itself makes a selection between the various possible causes and singles out one of them in such a positive manner that there can be said to exist between injury and the defendant's wrongful act the relationship of effect and cause, the conclusion is grounded, not in conjecture but in the proof. The essence of the evidence, in the present case, was that while the plaintiff was unconscious, threshing about in the bed, at times sitting straight, she vomited blood, gasped for breath, coughed more or less, and blood oozed from her mouth; during most of this time no attendant was present. It is conceded that infected blood was insufflated into her lungs and that infected blood breathed into the lungs is a cause of lung abscesses. Coughing and struggling to obtain air in the post-operative period is regarded by medical men as persuasive evidence that at those times blood is entering the bronchial tubes. While as previously suggested the burden always rests upon the plaintiff to remove the cause from the realm of speculation and give it a solid foundation upon facts (45 C. J., Negligence, 1267, § 835, cites an extensive collection of cases; Abbott's Trial Evidence (3d Ed. 1554) we believe that the proof has accomplished the required result. Such being our conclusion it follows that the circuit court did not err when it denied the motions for a nonsuit and for a directed verdict.

The next four assignments of error are predicated upon instructions given to the jury, or upon requested instructions which the court declined to allow. We have carefully studied the instructions given by the court and believe that they outlined with sufficient fullness all of the principles of law applicable to this action, which were necessary for the jury's guidance. One

of the three requested instructions, which the court declined to give, was intended to convey to the jury information denominated by this requested instruction "common knowledge" concerning the duties of a nurse. This "common knowledge" was in part contrary to the proof, and further would have intimated to the jury that the defendant was not liable for the actions of her attendant. The court did not err in declining to subscribe to this requested instruction. The next requested instruction, which the court declined to give, recited: "No one is required to guard against * * * that which under the circumstances is not likely to happen * * * and if you find from the evidence that the defendant had no reason to anticipate that abscesses would form in plaintiff's lungs, your verdict should be for the defendant." The evidence submitted by the plaintiff's physicians that abscesses would be likely to form in a patient's lungs as the result of insufflation of infected blood was not contradicted by any one. In fact, all of the physicians and nurses, of whom inquiries were made concerning the care to be exercised by a nurse and a physician, spoke of the danger attendant upon the aspiration of blood. Some of the defendant's witnesses were inclined to criticize the use of a general anaesthetic, in lieu of a local one, on account of the danger of inhaling blood which is attendant upon the use of a general anaesthetic. Such being the proof the requested instruction was properly denied as inapplicable to this case. The third requested instruction concerned itself with the measure of damages. Since this subject was properly and fully covered by instructions given, the court did not err when it refused this request. The instruction given and criticized in one of these four assignments of error, in reviewing the pleadings, stated: "The plaintiff alleges and has offered evidence to prove." The defendant argues that in using this

language the court commented upon the evidence. We believe that this contention is without merit. Since the court had already denied motions for a nonsuit and for a directed verdict, which were argued at length, it must have been apparent to any juror possessed of even a modicum of common reasoning power that the court believed that the plaintiff had made out a prima facie case. In addition, the instructions were preceded with a statement that the judge possessed no authority to comment upon the evidence nor to indicate to the jury his conclusions in regard to it. The remaining criticisms of this instruction we have carefully considered but believe they possess no merit.

The last assignment of error is founded upon the order of the circuit court denying defendant's motion for a new trial, which was based upon newly discovered evidence. During the trial defendant's counsel asked Dr. Anderson, who was plaintiff's surgeon, whether he had ever been convicted of a crime. He replied in the negative. After the trial defendant discovered that Dr. Anderson had been convicted of a misdemeanor September 21, 1926, in the state of California. The allowance of a motion for a new trial is a matter largely intrusted to the discretion of the circuit court. Generally newly discovered evidence, which will serve only the purpose of impeachment, is not deemed a sufficient reason for allowing a new trial: *State v. Hill,* 39 Or. 90 (65 P. 518); *State v. Gardner,* 33 Or. 149 (54 P. 809); *Territory v. Latshaw,* 1 Or. 146 (20 R. C. L. 294 and 46 C. J. 280). Since we are not persuaded that the circuit court abused its discretion in denying the motion for a new trial we do not believe that this assignment of error possesses merit.

It follows from the foregoing that the judgment of the circuit court will be affirmed.

Bean, C. J., Rand and Kelly, JJ., concur.

No. 1642—March 17, 1931

IN THE SUPREME COURT OF THE STATE OF OREGON

JACOB WEINSTEIN, A MINOR, by ROSE WEINSTEIN, Guardian ad litem, *Respondent, v.* SHANNA C. WHEELER, *Appellant.*

Appeal from Circuit Court, Multnomah County.

W. A. EKWALL, Judge.

Submitted on petition for rehearing.

In Banc.

Former opinion 295 P. 196.

*E. L. McDougal* and *Randall S. Jones* for appellant.

*Ralph A. Coan* and *Abe Eugene Rosenberg* for respondent.

ROSSMAN, J.

PETITION DENIED.

ROSSMAN, J. The brief accompanying the petition for a rehearing argues that our previous decision was in error for the following reasons: (1) The requested instructions, enunciating under what conditions a driver should stop his car when he observes a blind person directly ahead, was based upon a misapplication of the law; (2) any instruction upon the duty of stopping was inappropriate to this case because the complaint did not specify a failure to stop the automobile as a charge of negligence; and (3) the plaintiff did not except when the court modified plaintiff's requested instruction by adding the clause quoted in our previous decision.

We shall not repeat the reasons which persuaded us that the requested instruction, when applied to the

situation described in the complaint, should have been given. After considering the matter once more we remain satisfied with the conclusion previously announced. The defendant seems to be alarmed at the possible result if the instruction should be given upon the retrial in the precise language in which it is now couched. It is not essential that a trial court should ever adopt as its own the language of a requested instruction. The substance, but not the phraseology, is the important item. The principle, embodied in a requested instruction, if applicable to the case, may always be expressed in the language of the presiding judge so as to make its application by the jury just.

It is true that the complaint did not itemize a failure to stop as one of the specifications of negligence. But it did aver that the defendant drove her car "in such an exceedingly careless, reckless, negligent, and dangerous manner." It specifically charged the defendant with excessive speed, failure to slow down, skidding for a distance of sixty feet, and a failure to place her car under her control. It seems to us that any defendant confronted with such a charge would readily understand that all details included within the above specification would likewise be relied upon by the plaintiff; for instance, turning aside or stopping. And that being true it was not necessary to add prolixity to the pleading by specifically naming the implied details. Reasonable clearness in pointing out the duty and its breach satisfies the requirement that the pleader shall use "plain and concise language." Moreover, all of the evidence showing the need, or its lack, of stopping was developed without objection. The first mention of the absence of a specification charging a failure to stop occurs in this petition for a rehearing. If we should be warranted in believing that the pleading was

insufficient to include this charge, which we do not, yet section 1-911, Oregon Code 1930, demands that we disregard this error.

The fact that the plaintiff did not except to the court's modification of plaintiff's requested instruction did not preclude the trial court from granting a new trial when it discovered its error: *Spokane County v. Pacific Bridge Co.*, 106 Or. 550 (213 P. 151).

The petition for a rehearing is denied.